



- (1) Reportable: Yes
 (2) Of interest to other Judges: Yes
 (3) Revised

 Signature

 Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J 736-24

In the matter between:

WCL TRADING CC

Applicant

and

SETHOLE SAMSON NKANYANE

First Respondent

ROSALINA KANGATA JOSE

Second Respondent

PORTIA DERA

Third Respondent

ROSELINE PALESA MOLEBATS

Fourth Respondent

JOSEPH MADIOPE

Fifth Respondent

MANNERS KRAAI

Sixth Respondent

TEBOGO EDMUND MOJELA

Seventh Respondent

THABO CHIMALIZENI

Eighth Respondent

THANDO MESHACK XABA

Ninth Respondent

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Tenth Respondent

SIBONGISENI SITHOLE N.O.

Eleventh Respondent

Heard: 14 May 2026

Delivered: 25 August 2026

JUDGMENT

LAUBSCHER, AJ

Introduction

- [1] The Applicant is in the shuttle service business, which operates mainly in the tourist industry. Its main base of operations is in Cape Town.
- [2] The Applicant had a contract with Peermont Global (Pty) Ltd t/a Emperor's Palace to render shuttle services. The First to Ninth Respondents ("the Employees") were employed by the Applicant by virtue of its agreement with Emperor's Palace. Emperor's Palace is in Gauteng. The Applicant employed Mr Cassim at its Emperor's Palace business unit to *inter alia* manage this branch.
- [3] On 2 November 2021, at the offices of the Tenth Respondent ("the CCMA") in Benoni, Gauteng, the Applicant and the Employees concluded a written settlement agreement ("the Settlement Agreement"). This Settlement Agreement was the outcome of conciliation proceedings under case number GNJB8286-21.
- [4] The salient aspects of the Settlement Agreement are as follows:
1. The Applicant shall pay each of the Employees an amount equal to six months' remuneration in settlement of the dispute.
 2. The Rand value of the amounts due to each of the Employees is expressly stated.
 3. The settlement amount would be paid to each of the Employees in two instalments, the first on 29 November 2021 and the second on 31 December 2021.

4. Any variation of the Settlement Agreement must be in writing and signed by the parties.
 5. The parties consent to the Settlement Agreement being made an arbitration award in terms of section 142A of the Labour Relations Act.
 6. The Settlement Agreement is in full and final settlement of the dispute, as well as in full and final settlement of all statutory payments due to the Employees, unless excluded in terms of clause 4. No such exclusions are recorded.
 7. In the event of non-compliance with the Settlement Agreement, the defaulting party shall pay the full costs incurred by the other party in enforcing the agreement.
- [5] Mr Cassim signed the Settlement Agreement on behalf of the Applicant, and the First Respondent signed on behalf of the Employees.
- [6] The Managing Member and a fifty per cent membership holder of the Applicant, and the deponent to the Founding Affidavit, is Mr Unis Khan. Mr Cassim did not inform the members of the Applicant, including Mr Khan, of the Settlement Agreement at the time.
- [7] The Applicant did not pay the settlement amounts to the employees as set out in the Settlement Agreement.
- [8] The Employees took steps to enforce the Settlement Agreement, and on 6 April 2022, the Sheriff attended the premises of the Applicant's business unit at Emperor's Palace and served the Applicant with a notice of attachment. One of the Applicant's vehicles was attached. Mr Cassim did not immediately inform the members of the Applicant, including Mr Khan, of the notice of attachment.
- [9] Mr Cassim convened an urgent meeting with the members of the Applicant on 26 April 2022 and informed the members that he had entered into the Settlement Agreement on 2 November 2021.

- [10] On 2 June 2022, the Applicant instituted a review application in terms of section 145 of the Labour Relations Act¹ (LRA) in this Court under case number JR260-2022 (“the review application”). In terms of the review application, the Applicant sought the review of the arbitration award under case number GAJB8286-2021, the Settlement Agreement having been made an arbitration award in terms of section 142A of the LRA. (The papers in this review application are not before this Court. It seems, on the face of it, that the review application was brought about five months out of time.)
- [11] The review application came before Justice Phehane on 24 April 2024, who struck it from the roll for want of jurisdiction.
- [12] The Applicant did not request reasons for the striking off.
- [13] On 3 July 2024, the Applicant instituted this application.
- [14] In terms of the Notice of Motion, the Applicant seeks an order in the following terms:
1. Condonation for the instituting of this application for the declaring null and void ab initio, alternatively setting aside and rescission of a settlement agreement made an arbitration award on the 2nd of November 2021 under the auspices of the CCMA under case number GAJB8286-2021;
 2. Declaring null and void ab initio the settlement agreement made an arbitration award under the auspices of the Commission for Conciliation Mediation and Arbitration on the 2nd of November 2021 under case number GAJB8286-2021;
 3. ALTERNATIVELY setting aside and rescinding the settlement agreement made an arbitration award under the auspices of the Commission for Conciliation, Mediation and Arbitration on the 2nd of November 2021 under case number GAJB8286-2021;
 4. Directing that such of the Respondents as may oppose the relief sought herein be ordered to pay the costs of the application,

¹ Act 66 of 1995, as amended.

jointly and severally, the one paying, the others to be absolved, and on a scale that this Honourable Court deems fit;

5. Granting the Applicant further and/or alternative relief.

- [15] The Notice of Motion does not indicate the sections of the LRA or any other employment law, or the applicable rule in terms of the Rules of this Court, in terms of which it seeks the order set out in the Notice of Motion. This is clearly contrary to the principle set out in *Malinga and Others v KwaZulu-Natal Provincial Department of Education and Others*² where this court held that an applicant must clearly identify the basis of the relief sought, set out the legal source and identify the specific statutory provision that confers jurisdiction.
- [16] Insofar as the prayer for condonation is concerned, I assume that condonation is sought for the late filing of the application, although this is not clear from the Notice of Motion.
- [17] During argument, counsel for the Applicant indicated that there is actually no need for condonation, because the application is brought in terms of section 77(3) of the Basic Conditions of Employment Act.³ Later on, counsel argued that, actually, the appropriate section is section 158(1)(a)(iv) of the LRA, because this is an application for a declarator in terms of which the Settlement Agreement is declared null and void *ab initio*. He also argued that insofar as the setting aside or rescinding of the arbitration award is concerned, section 145 of the LRA is, in fact, the applicable section.
- [18] Counsel for the Applicant argued that insofar as the Notice of Motion does not contain the specific sections of the applicable legislation in terms of which the application is brought, the Applicant is entitled to this relief on the basis that the Notice of Motion includes the prayer for “further or alternative relief”.
- [19] Counsel for the Employees argued that the Applicant should stand or fall by its pleadings. In this case, there is no application for review of the arbitration award in terms of section 145 in these papers. In fact, the Honourable Justice

² (2020) 41 ILJ 2504 (LC).

³ Act 75 of 1997, as amended.

Phehane struck the review application that was brought on that basis under case number JR260-2022 off the roll for want of jurisdiction.

- [20] As mentioned above, the Applicant did not request reasons for the striking off. In the circumstances, it is not clear whether this was because the Court took the view that it did not have jurisdiction by virtue of section 145 of the LRA, or whether, for example, there was no application for condonation. We do not know. What we do know is that the matter was struck for want of jurisdiction.
- [21] The current application is one for a declarator that the Settlement Agreement is void *ab initio*. It is not a review application brought in terms of section 145 (or for that matter, section 158(1)(g)) of the LRA. As mentioned above, there is no application for review of the arbitration award in terms of section 145 in these papers.
- [22] In *Member of the Executive Council of the Department of Education, Eastern Cape v Gqebe*⁴, the Labour Appeal Court held that the court cannot simply set aside an arbitration award under the generic prayer of “further and/or alternative relief” where no basis has been laid for such relief in the supporting papers and the order sought is inconsistent with the substantive relief claimed.
- [23] This Court is not sitting as a reviewing court and no proper case for review has been made out on the papers. In the circumstances, this Court cannot of its own accord apply section 145 of the LRA and cannot, on the basis of granting “further and/or alternative relief” re-open the case on the basis of section 145.
- [24] At the heart of this matter is the validity of the Settlement Agreement. What complicates this case and what has led to some confusion is that the agreement was made an arbitration award, notably by consent. Given the nature of the application, the first question is whether the Labour Court has jurisdiction to determine it and the power to grant the relief sought.

⁴ (2009) 30 ILJ 2388 (LAC) at par 29-31. See also *Mulaudzi & Another v MEC, Infrastructure Development and Property Management (Gauteng Provincial Government)* (unreported) case number JS56/2025 of 11 August 2026.

- [25] Section 157(1) of the LRA provides that the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA, or in terms of any other law, are to be determined by the Labour Court. In terms of section 157(2), the Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution and arising from, *inter alia*, employment and labour relations.
- [26] Section 158 of the LRA sets out the powers of the Labour Court. The mere fact that a body or forum has a certain legislative power does not mean it has jurisdiction.⁵
- [27] What is wrong, however, is that section 158 of the LRA cannot be read as granting the Labour Court jurisdiction. In *Merafong City Local Municipality v SAMWU*⁶ the Labour Appeal Court held in this regard that “a proper reading of section 157 makes it clear that other provisions of the LRA are sources of jurisdiction of the Labour Court and section 157(1) and section 158(1) of the LRA list both specific remedial powers and provide a substantive jurisdictional basis of that court.”⁷
- [28] Section 157 must accordingly be read with section 158 of the LRA (and for that matter other relevant, applicable sections of the LRA or any other employment law) in order to determine whether the court has jurisdiction in a particular case.
- [29] This brings us then to section 158. In terms of section 158(1) of the LRA, the powers of the Labour Court include, among others, that the Labour Court may make any appropriate order⁸ including a declaratory order,⁹ an order to make a settlement agreement an order of the Court¹⁰ and the power to deal with all

⁵ *Merafong City Local Municipality v SAMWU* [2016] 8 BLLR 758 (LAC).

⁶ [2016] 8 BLLR 758 (LAC).

⁷ See also *O Thorpe Construction v Minister of Labour* (2015) 36 ILJ 935 (WCC) where the High Court held that the Labour Court had exclusive jurisdiction over a dispute relating to the Minister of Labour's failure to extend a bargaining council agreement to non-parties as contemplated in section 32(2) of the LRA.

⁸ Section 158(1)(a) of the LRA.

⁹ Section 158(1)(a)(iv) of the LRA.

¹⁰ Section 158(1)(c) of the LRA.

matters necessary or incidental to performing its functions in terms of this Act or any other law.¹¹

- [30] Section 158 does not expressly include the power to set aside a settlement agreement. However, in *Western Platinum Ltd v Swart*¹², this Court accepted “that given the Court’s jurisdiction to make settlement agreements orders of this Court, it has jurisdiction to deal with incidental matters, including a setting aside of the agreement on any recognised ground”. This residual power was recognised in *Ulster v Standard Bank of South Africa*.¹³
- [31] The Labour Court does not have the power to make every settlement agreement an order of the Labour Court. For purposes of section 158(1)(c), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or to the Labour Court. It expressly excludes disputes contemplated in section 22(4), 74(4) and 75(7) of the LRA.¹⁴
- [32] Consequently, the incidental power to set aside a settlement agreement is also limited to such settlement agreements.
- [33] In this case, the Employees referred a dispute regarding their alleged unfair dismissal to the CCMA. As set out in more detail below, it was this dispute that was settled in terms of the Settlement Agreement. The Settlement Agreement meets the requirements of section 158(1A): the dispute was one which the Employees were entitled to refer to arbitration (the alleged unfair dismissal claim), and it was reduced to writing and signed by representatives of the applicant and the Employees respectively.
- [34] In light of what is stated above, I am satisfied, for present purposes, that this court has jurisdiction to determine this application and that it has the incidental power to grant the relief sought.

The facts contained in the Answering Affidavit

¹¹ Section 158(1)(j) of the LRA.

¹² Case number J2195/14 [2016] ZALCJHB 454 (25 May 2016) (*Western Platinum*).

¹³ (2013) 34 ILJ 2343 (LC) (“*Ulster*”). See also *Eckhard v Filrpo Industrial Filters (Pty) Ltd & Others* (1999) 20 ILJ 2043 (LC).

¹⁴ Section 158(1A) of the LRA.

- [35] The sixth respondent, Mr Kraai, deposed to the Answering Affidavit.
- [36] The second, third, fourth, fifth, seventh, eighth and ninth respondents filed confirmatory affidavits in support of the averments contained in the Answering Affidavit insofar as they related to them.
- [37] The Applicant took issue that Mr Kraai, the sixth respondent, did not file a confirmatory affidavit. There is no merit in this contention, given that Mr Kraai deposed to the Answering Affidavit.
- [38] The first respondent, Mr Nkanyane, did not file a confirmatory affidavit. Other supporting documents relating to the allegations pertaining to Mr Nkanyane were, however, attached to the answering affidavit.
- [39] It is common cause that the fourth respondent, Ms Molebatsi, passed away on 28 February 2023.
- [40] Ms Molebatsi's confirmatory affidavit was signed on 7 August 2024. The signature of the deponent to this affidavit is entirely different from copies of the signature of Ms Molebatsi on documents the Applicant had in its possession.
- [41] The Applicant contends that this is highly irregular and, on the face of it, fraudulent.
- [42] In addition, the Applicant takes issue with the fact that the confirmatory affidavits were deposed to before a different commissioner of oaths than the commissioner who commissioned the Answering Affidavit; and that the confirmatory affidavits were commissioned in Sandton whereas the Answering Affidavit was commissioned in Johannesburg.
- [43] The Applicant submits that the totality of the Answering Affidavit ought to be disregarded and that the Applicant should be granted a punitive cost order for the unnecessary legal costs incurred by the Applicant in replying to the Answering Affidavit.

- [44] The Justices of the Peace and Commissioners of Oaths Act¹⁵ and the Regulations Governing the Administering of an Oath or Affirmation¹⁶ contain the rules for commissioning an affidavit. Of relevance is Regulation 3(1), which provides that the deponent must sign the declaration in the presence of the commissioner of oaths. In terms of Regulation 4(1), the commissioner of oaths must certify that the deponent has acknowledged that s/he knows and understands the contents of the declaration, and the commissioner must state the manner, place and date of taking the declaration. As per Regulation 4(2), the commissioner of oaths must sign the declaration and print her/his full name and business address below her/his signature; and state her/his designation and the area for which s/he holds the appointment or the office if s/he holds this appointment *ex officio*.
- [45] Confirmatory affidavits are self-standing affidavits. They do not need to be commissioned before the same commissioner as the one before whom the main affidavit is signed. However, being a self-standing affidavit, confirmatory affidavits must comply with the procedural requirements set above.
- [46] In the circumstances, there is no merit in the suggestion that the confirmatory affidavits deposed to by the second, third, fifth, seventh, eighth and ninth respondents are defective merely because they were commissioned before a different commissioner than the commissioner who commissioned the Answering Affidavit.
- [47] As regards the confirmatory affidavit of Ms Molebatsi, counsel for the Employees agreed that the Employees ought to have provided an explanation of what had transpired with the signing of this affidavit. In the absence of an explanation, Ms Molebatsi's confirmatory affidavit, which on the face of it is signed by someone else, is no affidavit at all.
- [48] The consequence is that any allegations or averments pertaining to her in the Answering Affidavit are inadmissible hearsay evidence.

¹⁵ Act 16 of 1963

¹⁶ GNR. 1258 of 12 July 1972

- [49] I do not agree that the entire Answering Affidavit ought to be disregarded. Rather, as was held in *Swissbourgh Diamond Mines, (Pty) Ltd and Others v Government of the Republic of South Africa and Others*,¹⁷ a surgical approach is what is required: only the inadmissible or prejudicial portions should be struck out, not the affidavit as a whole, unless the affidavit is so overwhelmingly defective that it prejudices the administration of justice.
- [50] Likewise, in *Mokoena-Masoeu v Nhlapho-Masoeu and Others*¹⁸ allegations in the main affidavit that relied on defective confirmatory affidavits were treated as unsupported and hearsay. The court did not discard the entire main affidavit, only the material dependent on the defective confirmations.
- [51] In the circumstances, any allegations and averments related to Ms Molebatsi are disregarded, including, insofar as they are relevant, facts related to the Settlement Agreement that was concluded on 2 November 2021.

The applicable legal principles for setting aside a settlement agreement that was made an arbitration award

- [52] Section 142A(1) of the LRA provides that the CCMA may make any settlement agreement in respect of a dispute that has been referred to the CCMA an arbitration award. This can be done by agreement between the parties to the settlement agreement or on application by one of the parties.
- [53] In terms of section 142A(2), a settlement agreement is a written agreement in settlement of a dispute that a party has the right to refer to arbitration or the Labour Court, excluding disputes contemplated in sections 74(4) or 75(7) of the LRA.
- [54] Section 143 of the LRA provides that an arbitration award is final and binding and that it may be enforced as if it were an order of the Labour Court in respect of which a writ has been issued, unless it is an advisory arbitration award. Such enforcement of an award may only take place if the director of

¹⁷ [1998] JOL 4144 (T).

¹⁸ [2023] JOL 59478 (FB).

the CCMA has certified that the arbitration award is an award contemplated in section 143(1).

- [55] Section 142A of the LRA was introduced with effect from 1 August 2002.
- [56] Before section 142A took effect, a party had to launch a separate court process in order to enforce the terms of a settlement agreement. This was obviously expensive and time-consuming. Section 142A cut out this process by giving the settlement agreement the same legal status as an arbitration award for enforcement purposes. Accordingly, once a settlement agreement is made an arbitration award, it can be enforced in terms of section 143 of the LRA.
- [57] Section 142A streamlines the enforcement of settlement agreements, provided that the agreement is in writing and it is in settlement of a dispute that a party has referred to arbitration or the Labour Court (excluding section 74(4) and 75(7) disputes).
- [58] Section 142A does not prescribe the manner in which a party may seek to set aside the settlement agreement or the consequent arbitration award. There also appears to be conflicting judgments of this Court on this point.
- [59] In *Department of Health v Jones*¹⁹ the Court held that a settlement agreement that has been made an arbitration award in terms of section 142A obtains the status of an arbitration award and can be enforced in terms of section 143, or made an order of the Labour Court in terms of section 158 of the LRA. As regards the setting aside of such a settlement agreement, the Court held as follows:

"It would seem to me that there are at least two ways in which the original settlement agreement that has now been made an arbitration award can be set aside. To revert to its status of being an agreement, the plaintiff needed to either apply for the rescission of the award in terms of section 144 or review it in terms of section 145 of the Act. It therefore means that until such time that the arbitration award was either rescinded in terms of section 144 or reviewed

¹⁹ [2009] 3 BLLR 195 (LC) at para 15.

and set aside in terms of section 145 of the Act, the court does not have jurisdiction to set aside the settlement agreement that gave rise to the arbitration award."

- [60] The effect of *Jones* is a two-stage approach: the award must first be rescinded or set aside in terms of section 144 or 145 so that it can revert to its status of being an agreement, and only then will the court have jurisdiction to consider the validity of the settlement agreement.
- [61] Applying this approach, it is common cause that the Applicant did not apply for the rescission of the award. The Applicant did bring a review application in terms of section 145, but that application was struck off the roll. As explained above, there is no section 145 application before me. In the circumstances, the arbitration award has not been reviewed and set aside, which means that this Court cannot consider the validity of the settlement agreement and this application ought to be dismissed on this basis.
- [62] I am, however, not satisfied that this is the correct approach.
- [63] In *Department of Education v Shilowa*²⁰ the court was asked to review the commissioner's refusal of an application for rescission of an arbitration award made under the auspices of the Education Labour Relations Council. The arbitration award in question came about by virtue of section 142A of the LRA. In this case, the respondent, Mr Shilowa, had referred an unfair labour practice dispute to the Council. Before the arbitration commenced, the parties concluded a settlement agreement. This agreement was made an arbitration award. In addition, Mr Shilowa instituted an application in the Labour Court to have the same arbitration award made an order of court in terms of section 158(1)(c) of the LRA. The Department sought to rescind the award in terms of section 144 of the LRA. This was while the section 158(1)(c) application was still pending. In the circumstances, the commissioner ruled that the matter was *sub judice* and that the Council did not have jurisdiction to preside over it. The Department applied to have the commissioner's ruling reviewed and set aside.

²⁰ [2023] JOL 60361 (LC) (*Shilowa*).

[64] Moshona J held that the commissioner was correct that the Council did not have jurisdiction to consider the application for rescission, but for a different reason. It stated:

“[11] ... There was no jurisdiction because the arbitration award sought to be rescinded is in itself, effectively, is a consensual product. (sic) Parties settled a dispute which they had the right to refer for arbitration and/or adjudication; parties, in agreement, asked that the settlement agreement they reached should be given another colour, which is that of an arbitration award. Put differently, as allowed by the LRA, all what the Commissioner did was, in the exercise of his discretion, paint the settlement agreement and adorn it with arbitration award colours. This arbitration award is not the same as the one contemplated in section 138(7) of the LRA.

[12] The one contemplated in section 138(7) is a sequel of arbitration proceedings. ... The arbitration award involved herein is not the product of arbitration proceedings.”

[65] Whereas *Jones* suggests that the section 142A arbitration award could be rescinded in terms of section 144, *Shilowa* takes the view that, once the settlement agreement is made an arbitration award, the Council (or CCMA) does not have jurisdiction to entertain such an application, because the underlying ratio for the arbitration is the parties' agreement.

[66] Unlike in the matter before this court, the court in *Shilowa* was not asked to consider the validity of the underlying settlement agreement; only to review the rescission ruling.

[67] In *Ulster*²¹ this Court did consider the validity of the underlying settlement agreement. In this case, the employee entered into a settlement agreement with the Bank, which was made an arbitration award in terms of section 142A. She claimed that she concluded the agreement under duress and wanted to have the agreement set aside. The Court, per the late Steenkamp J, noted that this Court has jurisdiction to review the award in terms of section 145 of the LRA, but in any event, “this Court has a residual power to set aside

²¹ *Ibid* n 1.

settlement agreements in terms of section 158(1)(j) of the LRA on such grounds as are acceptable in common law.”

[68] In my view, this is the correct approach.

[69] The underlying rationale for a section 142A arbitration award is the settlement agreement. Section 142A does nothing more than to streamline the enforcement of the agreement. Without the settlement agreement, there is nothing to enforce. Accordingly, if a party seeks to escape a settlement agreement that has been made an arbitration award in terms of section 142A, it should approach this Court in terms of section 158(1)(a)(iv) or section 158(1)(j) read with section 158(1)(c) of the LRA for an order that the settlement agreement is set aside. The normal contractual principles will apply in this regard.

[70] If the settlement agreement is not set aside, it remains of full force and effect, and if it was made an arbitration award in terms of section 142A, it can be enforced in terms of section 143.

[71] If the settlement agreement is set aside, the section 142A arbitration award becomes a nullity, because the underlying rationale for the award falls away. As mentioned above, there is then nothing to enforce.

[72] I accordingly disagree with the approach in *Jones* that the arbitration award must be set aside first before this Court would have jurisdiction to consider the validity of the settlement agreement. The settlement agreement is what gives rise to the section 142A award and what gives the section 142A award its identity. Without the settlement agreement, the award is meaningless.

[73] I am not suggesting that there would never be a case where the award itself would not be subject to review in terms of section 145 of the LRA, or to rescission in terms of section 144 of the LRA. If a settlement agreement is concluded and there is no agreement between the parties for it to be made an arbitration award, and a commissioner does so of her/his own accord in the absence of the other party (and not on application by a party), there may well be grounds for the rescission of the award in terms of section 144. Likewise, if

the commissioner makes a settlement agreement a section 142A award outside the parameters of section 142A, this could amount to misconduct or a gross irregularity in the conduct of the proceedings which could justify the review of the award in terms of section 145. This would have the effect that the speedy enforcement mechanism of being an arbitration award is removed – the settlement agreement itself will remain in force until it is set aside on common law grounds.

- [74] It would accordingly be expedient for a party who complains about the validity of a settlement agreement to bring an application to have the agreement set aside in terms of section 158(1)(a)(iv), which makes provision for the making of a declarator, or in terms of section 158(1)(j) read with 158(1)(c), being the court's residual powers, as per *Ulster*.
- [75] As mentioned above, the Applicant has applied for condonation. It is not entirely clear what this court is required to condone. Be that as it may, neither section 158(1)(a)(iv) nor section 158(1)(j) of the LRA requires such applications to be brought within a prescribed time period. The only applicable period would be prescription. (I pause to note that, insofar as this case was brought in terms of section 77(3) of the Basic Conditions of Employment Act, this section also does not prescribe a time period and no application for condonation would have been necessary. Section 77(3) does not, however, appear to me to be the appropriate section to set aside an agreement in terms of which a dismissal dispute is settled. Section 77(3) confers jurisdiction on this Court to determine any matter concerning an employment contract, irrespective of whether a basic condition of employment constitutes a term of that contract. While a mutual termination agreement would conceivably be "a matter concerning an employment contract" because it regulates its termination, the same may potentially not apply to a settlement agreement in terms of which a dismissal dispute is resolved. In such circumstances, the court's jurisdiction would be based on sections 158(1)(a)(iv) and 158(1)(j) read with section 158(1)(c) of the LRA, as set out above. However, given the approach I take in this matter, I do not need to decide this point.)

[76] In the circumstances, there is no need for condonation, and I do not need to consider this aspect any further. What needs to be determined is the validity or not of the Settlement Agreement dated 2 November 2021.

The events that led to the conclusion of the Settlement Agreement

[77] The COVID-19 pandemic hit South Africa in 2020. The declaration of the state of disaster and the lockdown had a particularly negative effect on the Applicant, as its business is dependent on tourists.

[78] On 4 May 2020, the employees of the Applicant were temporarily laid off. The Applicant relied on the Temporary Employer/Employee Relief Scheme ("TERS") for the partial payment of its employees' salaries during the lay-off. By December 2020, the TERS benefits were no longer available.

[79] In February 2021, the Applicant provided its employees with a certificate of service dated 10 February 2021. The certificate of service of the second respondent, Ms Jose, is attached to the Answering Affidavit. It appears that she signed for this certificate on 18 February 2021.

[80] The certificate of service states that Ms Jose "was in employment" "until 31.01.2021". The other Employees received similar certificates of service, indicating that their employment terminated on 31 January 2021.

[81] The Applicant's explanation is that this certificate formed part of a bundle of documents that were provided to its employees by Mr Abrahams, the Human Resource Manager of the Applicant, to enable them to continue to obtain benefits from the Unemployment Insurance Fund ("the UIF").

[82] Mr Abrahams was apparently told by the Department of Employment and Labour that the Applicant could complete the required UIF forms by utilising either code 05 (contract expired), code 06 (resigned), code 14 (business closed) or code 17 (reduced working time). The Applicant chose code 17 as the "reason for termination" on the UI-19 form.

[83] The Applicant does not indicate who Mr Abrahams liaised with at the Department of Employment and Labour, or at which UIF office, when he

obtained the advice above. No emails between Mr Abrahams and representatives of the UIF are attached to the papers.

- [84] The bundle of documents referred to above included the certificate of service, Form UI-19, Form UI-2.7 as well as a letter from the Applicant dated 18 January 2021. As mentioned above, the certificate of service indicated a termination date of 31 January 2021. Form UI-19 indicated the termination date as 31 January 2021 and “reduced working time” as the “reason for termination”. Although Form UI-2.7 indicated that the contributor was expected to resume full working hours on 1 May 2021, the Salary Schedule Form attached to this form indicated the termination date as 31 January 2021.
- [85] The letter from the Applicant dated 18 January 2021, which formed part of the bundle that was provided to the Employees on about 18 February 2021, confirmed that the Applicant believed that it was prudent to continue with the implementation of temporary lay-offs until 30 April 2021 as a risk mitigation measure to attempt to preserve funds as far as possible and to avoid retrenchments. It also confirmed that a “temporary lay-off” meant that employees would not be paid but that they remained employees of the Applicant; that the Applicant was hoping that the amount of work would increase and that the temporary lay-off might be replaced by “reduced work time” where employees would be paid for work hours/days worked. As regards UIF benefits, the Applicant undertook to assist the employees to apply for UIF benefits during the lay-off period.
- [86] Thus, by February 2021, the Applicant had provided its employees with two conflicting messages: on the one hand it stated that the employees would be on temporary lay-off and remain employees; and on the other hand, it provided the employees with a number of documents (and represented to the UIF) indicating that their services had terminated on 31 January 2021. On the Applicant’s version, this was to assist the employees to claim UIF benefits. Notably, the TERS benefits were no longer available, and the benefits which the Applicant assisted the employees to obtain could have been nothing other than unemployment benefits.

- [87] I pause to state that the Applicant is very critical of the Employees for allegedly not taking the Court into their confidence, and attempting to mislead the Court, by averring that they were dismissed on 31 January 2021 when actually they remained employed; this in circumstances where the Applicant itself misrepresented the date of dismissal in order to secure the payment of unemployment benefits from the UIF.
- [88] On 17 March 2021, the Applicant commenced a retrenchment consultation process with all its employees at the time, including the Employees. The letter in terms of section 189(3) invited the employees to contact Mr Abrahams if they required additional information. Mr Cassim was, however, tasked with managing the retrenchment process. Following the first consultation meeting on 17 March 2021, the Applicant halted the process, ostensibly to explore alternatives.
- [89] No alternatives were identified and the second retrenchment consultation meeting took place on 19 October 2021. The Applicant makes the point that the Employees were still receiving their UIF benefits by this date.
- [90] During the consultation on 19 October 2021, Mr Cassim was informed that Mr Nkanyane and 16 other employees had referred a dispute to the CCMA and that conciliation was set down in November 2021.
- [91] The Applicant contends that this was the first time it became aware of this CCMA referral. Mr Cassim made inquiries with the CCMA. He was provided with the notice of set down, but was not provided with the Form 7-11 dispute referral. The notice of set down is not attached to the papers.
- [92] What happened after the first consultation meeting in March 2021 is that on 4 May 2021, the Employees referred an unfair dismissal claim to the CCMA under case number GAJB8286-21. In terms of the Form LRA 7.11, the Employees contended that they were dismissed, that this was for “unknown reasons” and that the dispute arose on 19 March 2021.
- [93] The employees applied for the condonation of the late filing of their referral. From Mr Nkanyane’s affidavit in support of condonation of the late filing of the

dispute, it seems that the Employees were advised by the Department of Employment and Labour a few days prior to their dispute referral on 4 May 2021 that their employment had terminated. This was apparently based on the certificate of service.

- [94] Condonation was granted on 11 June 2021. In the condonation ruling, (not surprisingly) the commissioner stated that the case was “somewhat confusing”. This was because the Employees had contended on the one hand that they were dismissed within the meaning of section 186(1)(a) of the LRA, while on the other hand that they were dismissed for reasons relating to operational requirements. The commissioner held that there was not sufficient information before the CCMA to make findings in this regard. Importantly, the commissioner ruled that the prejudice favoured the Employees because the employer would still have its day in court to defend itself against the unfair dismissal claim.
- [95] On 22 October 2021, Mr Abrahams addressed a termination letter to each of its employees in terms of which it was stated: *“I regret to inform you that your employment with the Company will be terminated on the 30th of November 2021. Severance payments shall be made in accordance with the LRA, this will be communicated with you soonest.”*
- [96] On 2 November 2021 the dispute referred under case number GAJB8286-21 was set down for conciliation.
- [97] Mr Cassim represented the Applicant at the conciliation during which the Settlement Agreement was signed. The Applicant contends as follows:
1. The Commissioner did not want to consider any submissions made by Mr Cassim regarding the retrenchment process.
 2. The Commissioner unduly pressured him to settle with the Employees.
 3. The Commissioner had intimated to Mr Cassim that the retrenchment process was flawed and that each of the Employees may be awarded compensation equal to twelve months’ salary.

4. Mr Cassim panicked. He was fearful that he might have made a mistake in the retrenchment process and that he was the cause of why each of the Employees might be awarded twelve months' compensation.
5. He was under enormous stress and nearly suffered a nervous breakdown.
6. He offered payment of two months' remuneration per Employee. The Commissioner rejected this. He increased the offer to three months' remuneration per Employee. Again, the Commissioner rejected this.
7. The Commissioner indicated that if the Applicant did not settle for six months' remuneration per Employee, the arbitration would commence immediately.
8. He accordingly signed the Settlement Agreement.

[98] The Applicant contends that Mr Cassim had no mandate to settle the dispute on the terms he did, and that he knew this. Mr Cassim accordingly did not disclose to the management of the Applicant that he had settled the dispute on the basis of payment of six months' remuneration per Employee. The Applicant's management also did not follow up with Mr Cassim after the conciliation as to what had transpired.

[99] The Employees' version of the events at conciliation is that:

1. Mr Cassim was the only manager of the Applicant the Employees had had dealings with. He was in charge of the Applicant's Johannesburg business branch.
2. Mr Cassim was constantly taking instructions by phone during the conciliation.
3. The Applicant does not state that Mr Cassim did not have a mandate at all. All it does is state that Mr Cassim did not have the mandate to settle at six months.

After 2 November 2021

[100] The Applicant did not perform in terms of the Settlement Agreement.

[101] Other employees, including one Mr Mbema, signed a retrenchment agreement on 16 November 2021. The Applicant explains that Mr Mbema was initially one of seventeen employees (including the Employees) who had referred the dispute to the CCMA. Mr Mbema and seven other employees withdrew their case after Mr Cassim explained to them that the retrenchment process had now been finalised; that their employment would terminate on 30 November 2021 and that their severance packages were being prepared. These employees were subsequently paid.

[102] The Employees were not given similar retrenchment agreements nor were they paid their severance packages as a consequence of their retrenchments. The Applicant states that this was because the Applicant had thought that the CCMA dispute set down for 2 November 2021 related to the retrenchment process and that this dispute would be addressed at the conciliation on 2 November 2021. The Applicant states further that if not for the unfair dismissal referral and the Applicant's assumption that the dispute related to the retrenchment process, it would have prepared retrenchment agreements for the Employees as well.

[103] This explanation is troubling. All the employees had received the letter terminating their employment on 22 October 2021. They were told that they would be paid their severance pay as soon as possible. The retrenchment agreements were dated 16 November 2021, two weeks after the conciliation took place on 2 November 2021. By this stage, Mr Cassim was well aware that he had concluded a settlement agreement with the Employees. There was accordingly no need to conclude a retrenchment agreement for them as well.

[104] On 6 April 2022, the Sheriff attended at the premises of the Applicant's branch at Emperor's Palace. The Applicant was served with a notice of attachment.

[105] Again, Mr Cassim did not immediately inform the Applicant's management of the notice of attachment. He only did so on 26 April 2022 when he informed them that he concluded the Settlement Agreement on 2 November 2022.

- [106] The Applicant thereupon, on 2 June 2022, instituted an application for the review of the arbitration award, the Settlement Agreement having been made an award in terms of section 142A by consent, under case number JR260-2022.
- [107] On 29 June 2022, the Sheriff removed a Hyundai motor vehicle in execution of the award.
- [108] On 20 July 2022, the Sheriff informed the Applicant that the vehicle would be sold for R60,000.
- [109] In order to stay the sale in execution of the vehicle, the Applicant paid the Sheriff the amount of R61,473.17. When the Applicant's driver went to the Sheriff's premises to obtain the vehicle, the Sheriff informed the Applicant that there was a new attachment order. The vehicle was accordingly released but reattached as per the new attachment request.
- [110] It subsequently transpired that the Sheriff distributed the amount of R50,427.07 to the First Respondent, Mr Nkanyane, on 26 July 2022.
- [111] The Applicant thereupon approached the Labour Court under case number J1044/22 and on 30 August 2022 obtained an urgent stay of the enforcement of the award pending the finalisation of the review application.
- [112] These facts are relevant insofar as the Employees allege that the Applicant "partially performed" under the Settlement Agreement in that Mr Nkanyane was paid his settlement amount, and therefore that the Settlement Agreement ought not to be set aside. Counsel for the Employees has confirmed that, insofar as the Settlement Agreement is not set aside, Mr Nkanyane has been paid and the Applicant will not be required to pay him his settlement amount.
- [113] The review application was struck off the roll for want of jurisdiction on 24 April 2024.
- [114] For completeness, on 17 May 2024, the Employees' attorneys of record instructed the Sheriff Cape Town East to attach the Applicant's assets. On 23 May 2024, the Sheriff attached property of the Applicant. It was, however,

agreed between the parties that the Employees' attorneys would instruct the Sheriff to halt further steps in the execution of the award. The Applicant further undertook to finalise and pay the severance packages to the Employees.

Principles for declaring a settlement agreement void *ab initio* alternatively setting aside a settlement agreement

- [115] There is a strong public interest in upholding settlement agreements. With reference to the Labour Appeal Court's decision in *GB Engineering (Pty) Ltd v Mbongo & Others*,²² this Court, in *Sizakancane Business Enterprises cc v CCMA and Others*,²³ emphasised that parties who settle disputes "seriously and willingly" should not lightly be released from such undertakings. Likewise, in *Buthelezi v Liberty Group Ltd*²⁴, the Labour Court confirmed that, as a general rule, a person is bound by the terms of a signed agreement, even if they later regret it, and that a party seeking to escape such an agreement bears the *onus* of proving that it is not binding.
- [116] Normal contractual principles apply pertaining to declaring a settlement agreement void *ab initio*, alternatively setting aside a settlement agreement.
- [117] Where a party is unduly influenced into concluding an agreement, or induced into doing so by misrepresentation, the agreement is voidable rather than void *ab initio*. Such an agreement remains in effect until it is set aside.²⁵
- [118] An agreement is void *ab initio* if it does not satisfy all the requirements of a valid contract and is therefore unenforceable. In *Pillay v MPC Managed Solutions (Pty) Ltd*²⁶ this Court held that this would be the case where the terms of the contract are illegal. Similarly, where a party is placed under duress to the extent that it destroyed true consent, the contract may be void *ab initio*.

²² [2023] ZALAC 29; [2024] 1 BLLR 14 (LAC); (2024) 45 ILJ 267 (LAC).

²³ Case number JR542/23 of 18 March 2025 ("*Sizakancane*").

²⁴ [2011] JOL 27902 (LC) ("*Buthelezi*").

²⁵ *Pillay v MPC Managed Solutions (Pty) Ltd* [2025] JOL 74704 (LC) ("*Pillay*") at para 10

²⁶ [2025] JOL 74704 (LC) ("*Pillay*") at para 10.

- [119] This might be the case where the party concluding the agreement was subjected to an “unlawful threat, physical force or imminent harm, which caused them to be afraid”.²⁷ The Labour Appeal Court expressed the test in this regard that actual violence or reasonable fear must be shown. This fear must be caused by the threat of some considerable evil to the person concerned, or to her/his family. The threat must be unlawful or *contra bonos mores* and the moral pressure used must have caused damage.²⁸
- [120] “Hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power”.²⁹ Something more is accordingly required for economic bargaining to be “illegitimate or unconscionable and thus to constitute duress”.³⁰
- [121] In *Shange & Another v Unico Tec (Pty) Ltd*³¹ emphasised that the threat giving rise to duress must be imminent and inevitable. Insofar as the threat is one of financial or economic pressure, the court referred to *Medscheme Holdings (Pty) Ltd & Another v Bhamjee*³² in which the Supreme Court of Appeal confirmed that this principle is yet to be accepted into our law. Here the Supreme Court of Appeal held that “economic ruin” could, in appropriate cases, be recognised as constituting duress, but cautioned that such cases would be rare.
- [122] In *Sizakancane*, the applicant arrived at the con-arb prepared for arbitration and resolute not to settle. Despite this, the applicant and the employee concluded a settlement agreement which required the applicant to pay the employee an amount of R37,500 in five instalments. The applicant sought to have the settlement agreement set aside because the commissioner allegedly informed the applicant that if the arbitration proceeded, it could end up paying about R300,000 for legal costs and the matter could take years to finalise. The applicant contended that in doing so, the commissioner abused his

²⁷ *Sizakancane* at para 6.

²⁸ *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd & Another* [2016] JOL 36085 (LAC) (“*Gbenga-Oluwatoye*”).

²⁹ *Medscheme Holdings (Pty) Ltd & another v Bhamjee* 2005 (5) SA 339 (SCA) (“*Bhamjee*”) at para 18.

³⁰ *Ibid.*

³¹ [2024] JOL 64742 (LC) (“*Shange*”).

³² *Bhamjee* at para 18

position of authority, was biased against the applicant, and the applicant accordingly concluded the agreement against its will.

[123] In dismissing the application, this Court held that “it is trite that effective mediation or conciliation requires the commissioner to address the potential consequences of failing”.³³ Likewise, in *Lahee Construction v Nkomo & Others*³⁴ this Court held that by no stretch of the imagination could the conduct of a commissioner amount to duress or undue influence where the commissioner informed a party of the consequences of failed negotiations.

[124] The Court in *Sizakancane* further took into account that the settlement agreement was concluded by the owner of the business in the presence of the HR manager. This was therefore not a case of an “innocent, impressionable, uneducated or naïve individual having been induced into a settlement”.³⁵ Rather, it was a case where the applicant accepted the advice of the commissioner, entered into the settlement and then regretted doing so.³⁶ This was not a basis to set aside the agreement.

[125] Likewise, in *Ulster*, the application for the setting aside of the settlement agreement was dismissed. The court took into account that Ms Ulster “*is an experienced and informed woman, wise to the world of business and contracts. ... She could have rejected the Bank’s counter-proposal at any stage and insisted on proceeding with the arbitration. She could have asked to consult with her legal representatives again before saying “OK” and subsequently signing the agreement. And even if she were unhappy with her representative, she could have taken it up with her trade union and asked for a postponement; she did not do so.*”³⁷

[126] Turning to the facts of this matter, the Applicant contends that the Eleventh Respondent (“the Commissioner”) unduly pressured Mr Cassim to settle with the Employees. This pressure consisted in the Commissioner indicating that the arbitration would proceed immediately and that the Employees “may” be

³³ *Sizakancane* n 10 at para 6.

³⁴ Case number J2178/13 dated 12 April 2016 (“*Lahee Construction*”) at para 29.

³⁵ *Sizakancane* n 10 at para 10.

³⁶ *Ibid* at para 11.

³⁷ *Ulster* n 1 at para 13. See also *Lahee Construction* at para 30.

awarded twelve months' remuneration as compensation. Mr Cassim further thought that he had done something wrong in relation to the retrenchment process and that he was the reason why the Applicant may be ordered to pay the Employees an amount equal to twelve months' remuneration as compensation.

[127] I deal first with Mr Cassim's confusion regarding the nature of the dispute that was being conciliated. As mentioned above, it is alleged that he had thought that the dispute related to the retrenchment process that was under way at the time. The Applicant contends that it obtained the dispute referral form for the first time when the file was uplifted for purposes of instituting the section 145 review application. It is extraordinary that a business manager would attend a legal process at the CCMA, sign a settlement agreement under a particular case number and not know what dispute he was settling. At the very least, Mr Cassim should have asked for the dispute referral form while at the CCMA in order to satisfy himself of the nature of the dispute that was being conciliated. This is particularly so because Mr Cassim was told on 18 October 2021 that a dismissal dispute was set down for conciliation in November 2021, well before Mr Cassim issued the letter of termination to the Applicant's employees on 22 October 2021. In the circumstances, Mr Cassim could not reasonably have thought that the dispute being conciliated on 2 November 2021 was the retrenchment process that was under way at the time. Insofar as Mr Cassim failed to satisfy himself regarding these facts and nevertheless concluded the Settlement Agreement, he did that at his (and the Applicant's) peril.

[128] There is nothing untoward for a commissioner during conciliation to put the risks of proceeding with the litigation process to the respective parties. On the Applicant's own version, the Commissioner indicated that the Employees "may" be awarded twelve months' remuneration. This is the legal position in the case of an unfair dismissal.

[129] Was this potential risk "imminent"? The Applicant contends in the Founding Affidavit that the matter was set down for "conciliation" on 2 November 2021. During argument, counsel for the Applicant suggested that it was set down for "con-arb". As mentioned above, the notice of set down is not before me.

- [130] If the matter was set down for conciliation only, then the arbitration could not have proceeded to arbitration immediately after conciliation, and there would have been no possibility of an arbitration award being made immediately on 2 November 2021 if no settlement agreement was concluded. Then the dispute would have been set down for arbitration at a later date, and the Applicant would have had the opportunity to present all the relevant facts and evidence before an award would be made.
- [131] If the matter was set down for con-arb then one would have expected that the Applicant would come prepared. This means that all the witnesses necessary to explain the Applicant's version would have been present in order for the Applicant to present its case. One of these witnesses was Mr Abrahams, who was the one who issued the certificates of service and the letter dated 18 January 2021 to the Employees, and whose name appeared on the section 189(3) letter as the one who could be contacted by the Employees.
- [132] If the matter was set down for con-arb and the Applicant was not prepared to proceed with the arbitration, Mr Cassim could have applied for a postponement in order to ensure that all the relevant evidence was placed before the arbitrating commissioner before a finding was made. There was accordingly not an immediate or imminent threat.
- [133] Even if there was, there was no risk of violence or some considerable evil to the person or family of Mr Cassim. Nor was the risk unlawful or *contra bonos mores*. The risk was one of economic pressure. There is no evidence that suggests that there was a risk of financial ruin, which is what the SCA held in *Bhamjee* could potentially amount to duress. There could not have been a risk of financial ruin, given that the Applicant is still in business and is pursuing this application.
- [134] Another factor weighing against the argument that Mr Cassim was "unduly pressured" is that he actively took part in the negotiations. He offered two months' remuneration per Employee. When that offer was rejected, he offered three months' remuneration per Employee. Ultimately, the settlement at six months' remuneration per Employee was concluded.

[135] The Settlement Agreement contains the Rand amounts which differ per Employee. Surely this required verification and confirmation by Mr Cassim that these numbers were correct. Mr Cassim accordingly actively participated in crafting the Settlement Agreement.

[136] It must therefore be accepted that it is not a case where Mr Cassim did not have a mandate to settle at all. Rather, he negotiated and concluded an agreement at an amount higher than what the Applicant had hoped to pay.

[137] Mr Cassim contends that he “panicked” and hence concluded the agreement. This is, however, not a basis to conclude that he was “unduly pressured” or placed under duress that would cause the agreement to be declared void *ab initio* or set aside.

[138] In the words of this Court in *Ulster*, Mr Cassim entered into the agreement with open eyes, fully aware of its consequences. This is why he kept it hidden from the Applicant. He knew that he had concluded a valid and enforceable agreement.

[139] In the circumstances, there is no basis for the Settlement Agreement to be declared void *ab initio* or set aside and the Applicant is bound by the agreement.

Arbitration award

[140] The settlement agreement remains in force.

[141] Being the underlying rationale for the section 142A arbitration award, the Settlement Agreement remains an arbitration award which can be enforced in terms of section 143 of the LRA.

Partial performance

[142] As set out above, it is common cause that Mr Nkanyane has received his settlement amount, albeit through the Sheriff.

[143] As regards Ms Molebatsi, all facts pertaining to her are struck out, including the facts pertaining to the Settlement Agreement insofar as she is concerned.

Costs

[144] The Settlement Agreement entitles a party to costs, but only insofar as they relate to proceedings to enforce the award.

[145] This application is an application to have the Settlement Agreement declared void *ab initio*, alternatively set aside. It was necessitated by a considerable amount of confusion. Some of this confusion was of the Applicant's own doing, such as the misrepresentation pertaining to the Employees' termination date as 1 January 2021, however well-intended. There was furthermore the issue of the initial section 145 review application, which was struck off the roll.

[146] At the same time, the Employees filed a confirmatory affidavit signed by someone other than the Employee to whom it related, with no explanation of how this came about.

[147] In the circumstances, I do not believe that this is a case that warrants a costs order.

[148] In the results, the following order is made:

Order

1. The application is dismissed.
2. The Settlement Agreement remains enforceable as an arbitration award in respect of each of the respective Employees, except in respect of Mr Nkanyane, who has received his settlement amount, and except in respect of Ms Molebatsi's estate.
3. There is no order as to costs.

T. Laubscher

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: U. Mlamleli, instructed by Rwasabisi Attorneys

For the Respondent: T. Malungani, instructed by Mphatlalazana Attorneys

LABOUR COURT